Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	

REPLY COMMENTS OF THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES and the NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)[1] and the National Telecommunications Cooperative Association (NTCA)[2] (the Associations) hereby submit these reply comments in the above-captioned proceeding.[3] The Associations' members increasingly seek to serve as multichannel video programming distributors (MVPDs). The Federal Communications Commission (the Commission) has long recognized the intrinsic link between a provider's ability to offer video

[1] OPASTCO is a national trade association representing approximately 400 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve approximately 3 million customers.

[2] NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

[3] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition,* Report and Order in MB Docket Nos. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Docket No. 12-68, Order on Reconsideration in MB Docket No. 07-29 (rel. Oct. 5, 2012) (2012 Program Access Order, Further Notice).

service and to deploy broadband networks.[4] Therefore, access to video programming at reasonable rates and conditions is imperative to rural LECs' efforts to provide broadband services to consumers in high-cost areas.

The Further Notice seeks comment on whether the Commission should establish certain rebuttable presumptions, namely: (i) that exclusive contracts for cable-affiliated regional sports networks (RSNs) or national sports networks (NSNs) constitute an "unfair act" under Section 628(b) of the Cable Act of 1992; (ii) that complainants challenging exclusive contracts under that section are entitled to a standstill of an existing contract pending resolution; and (iii) if an exclusive contract for cable-affiliated programming is found to violate Section 628(b) through the complaint process, any exclusive contract for the same programming is also in violation. As explained below, the Associations support the establishment of these presumptions.

II. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT EXCLUSIVE CONTRACTS FOR CABLE-AFFILIATED REGIONAL OR NATIONAL SPORTS NETWORKS CONSTITUTE AN "UNFAIR ACT" UNDER SECTION 628(b)

The Further Notice asks whether the Commission should establish a rebuttable presumption that an exclusive contract for a cable-affiliated RSN or NSN (regardless of whether it is terrestrially delivered or satellite-delivered) constitutes an "unfair act" under Section 628(b).[5] Evidence in the record supports such a presumption. The Commission, recognizing the need for MVPDs to have access to programming in order to remain competitive, has previously established rebuttable presumptions with regard to access to programming.

[4] MB Docket No. 05-311, 22 FCC Rcd 5101, 5132-33, ¶62 (2007). In addition, a 2009 study conducted by the National Exchange Carriers Association (NECA) found that members of its Traffic Sensitive Pool offering broadband using Digital Subscriber Line (DSL) technology along with a video component had DSL adoption rates nearly 24 percent higher than those companies offering DSL without access to subscription video services. *See* NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (filed Dec. 7, 2009).

[5] Further Notice, ¶74, ¶80.

As noted by the American Cable Association (ACA), the Commission has correctly found that with the sunset of the exclusive contract prohibition, MVPDs will face much greater difficulty in obtaining access to programming through the Section 628(b) complaint process.[6] ACA further observes that the Commission has found that Section 628(b) can function more efficiently through rebuttable evidentiary presumptions.[7] Sports programming in particular has been repeatedly found by the Commission to be in high demand and non-replicable.[8] Parties further observe that national sports programming is in high demand and is as non-replicable as regional sports programming.[9] Therefore, a rebuttable presumption establishing that exclusive contracts for sports programming constitute an "unfair act" should include national as well as regional sports content.

Moreover, ITTA highlights that adoption of these rebuttable presumptions would make it more practical for the Commission to comply with the newly-established six-month deadline for resolution of complaints regarding denial of access to cable-affiliated programming.[10] ITTA further explains that by affirmatively establishing that exclusive contracts for critical programming constitute an "unfair act" under Section 628(b), the Commission will provide an additional incentive for vertically-integrated cable operators and programmers to negotiate in good faith.[11] Such an incentive would preclude (or at least minimize) the need for MVPDs to engage in the complaint process in the first place.

The Commission should therefore establish a rebuttable presumption that exclusive contracts for cable-affiliated regional and national sports networks, regardless of whether they

[6] ACA, p. 26, citing 2012 Program Access Order, ¶46.
[7] *Id.*, citing 2012 Program Access Order, ¶55, *et. al.*
[8] *Id.*, p. 29 (multiple citations omitted).
[9] ACA, pp. 34-38; Independent Telephone and Telecommunications Alliance (ITTA), p. 12; United States Telecom Association, pp. 5-8.
[10] ITTA, pp. 11-12.
[11] *Id.*, pp. 12-13.

are delivered via satellite or terrestrially, constitutes and "unfair act" under Section 628(b). Doing so would be consistent with prior Commission findings and the market realities surrounding sports programming. More importantly, it would serve the public interest by incenting programmers to negotiate in good faith, and in instances where this fails, provide a more workable approach for MVPDs and the Commission to resolve program access complaints.

III. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT COMPLAINANTS CHALLENGING AN EXCLUSIVE CONTRACT FOR CABLE-AFFILIATED PROGRAMMING ARE ENTITLED TO A STANDSTILL OF AN EXISTING CONTRACT PENDING RESOLUTION OF THE COMPLAINT

The Further Notice asks whether the Commission should establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN or NSN (regardless of whether it is terrestrially delivered or satellite delivered) is entitled to a standstill of an existing programming contract for that sports network during the pendency of a complaint.[12] Sports content in particular is often time-sensitive, and standstill provisions are essential to prevent consumers from being victimized by programmers' stranglehold on access to these events. As ITTA explains, standstills would minimize the impact on subscribers who may otherwise lose access to critical programming during a pending dispute. It would also limit the ability of vertically-integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations), encourage good-faith negotiation and settlement of program access disputes, and increase the utility of the program access complaint process.[13]

ACA notes that under current rules, a complainant may obtain a standstill if four conditions are met: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the

[12] Further Notice, ¶¶78-80.
[13] ITTA, p. 15.

complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other parties; and (iv) the public interest favors the grant of a stay.[14] ACA also correctly states that once the Commission has established rebuttable presumptions concerning exclusive contracts involving cable-affiliated sports programming (whether that programming is terrestrially or satellite delivered), it is rational to infer that a complainant will satisfy these four conditions for demonstrating entitlement to the standstill of an existing RSN agreement during the pendency of a complaint.[15]

Absent a standstill provision, consumers remain at the mercy of vertically integrated programmers whose ability and incentive to discriminate against non-affiliated MVPDs remain unabated. To ensure that the complaint procedures of Section 628 are effective, the Commission should establish standstill provisions in tandem with a rebuttable presumption that exclusive contracts for sports programming violate this provision of the law.

IV. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT IF AN EXCLUSIVE CONTRACT INVOLVING CABLE-AFFILIATED PROGRAMMING IS FOUND TO VIOLATE SECTION 628(b), ANY EXCLUSIVE CONTRACT INVOLVING THE SAME PROGRAMMING ALSO VIOLATES THE LAW

The Further Notice asks whether the Commission should establish a rebuttable presumption that, once a complainant succeeds in demonstrating that an exclusive contract involving a cable-affiliated network (regardless of whether it is terrestrially delivered or satellite-delivered) violates Section 628(b) (or, potentially, Section 628(c)(2)(B)), any other exclusive contract involving the same network also violates Section 628(b) (or Section 628(c)(2)(B)).[16]

ACA explains that it would be justifiable and reasonable for the Commission to adopt such a presumption because the primary factors that determine whether or not an exclusive

[14] ACA, pp. 39-46.
[15] *Id.*, 46.
[16] Further Notice, ¶81.

contract complaint succeeds will be the same regardless of the MVPD in question. As ACA states, "if one MVPD has been able to establish that it will be significantly harmed by withholding of the programming and that the competitive benefits from this withholding are unlikely to exceed the competitive harms, then it is very probable that another MPVD will be able to establish the same set of facts."[17]

There is no reason to presume that if an exclusive contract for particular programming harms one MVPD and its consumers, other MVPDs and their consumers would not be similarly harmed by the same contract. Therefore, the Commission should establish a rebuttable presumption that once a contract has been found to be in violation of Section 628(b) or similar provisions as a result of one complaint, other exclusive contracts for the same programming should also be deemed impermissible and unlawful.

V. CONCLUSION

The Commission should establish rebuttable presumptions that exclusive contracts for cable-affiliated RSNs or NSNs constitute an "unfair act"; that standstills of existing contracts should be provided to complainants pending resolution; and that once an exclusive contract for cable-affiliated programming is found to violate Section 628(b), any exclusive contract for the same programming also violates that law. These rebuttable presumptions will streamline the program access complaint process, making it more accessible to small rural video providers that strive to serve consumers in high-cost areas. They will also provide large vertically integrated programmers with more appropriate incentives to bargain in good faith with small MVPDs, reducing the need of these providers to utilize the complaint process in the first instance and relieving the Commission of the burden of resolving such complaints.

[17] ACA pp. 38-39; *see also* ITTA, p. 14.

Respectfully submitted,

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January 14, 2013